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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 178.

R. E. PECKHAM, Assignee for the Creditors of The Meyer-Kiser Bank, succeeding Thomas E. Garvin, Receiver of The Meyer-Kiser Bank,

and

R. E. PECKHAM, Trustee,

Petitioners,

vs.

FAMILY LOAN COMPANY, a corporation;
FERD S. MEYER, otherwise known as Ferdinand S. Meyer;
FERDINAND S. MEYER, Trustee, otherwise known as Ferd S. Meyer, Trustee;
ROSALYN A. MEYER, otherwise known as R. A. Meyer;
JAMES MEYER;
JAMES MEYER, Trustee;
HOKE T. MAROON, otherwise known as H. T. Maroon;
H. T. MAROON, Trustee, otherwise known as Hoke T. Maroon, Trustee;
SEABOARD FINANCE COMPANY OF FLORIDA, a corporation;
SEABOARD FINANCE COMPANY, a Delaware corporation;
TOWN FINANCE COMPANY, INC., a corporation,

Respondents.

BRIEF OF RESPONDENTS, FAMILY LOAN COMPANY, FERD S. MEYER, FERDINAND S. MEYER, Trustee, ROSALYN A. MEYER, JAMES MEYER, JAMES MEYER, Trustee, HOKE T. MAROON, H. T. MAROON, Trustee, TOWN FINANCE COMPANY, INC., a Corporation, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Miami, Florida,
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ROSALYN A. MEYER, otherwise known as R. A. Meyer;
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JAMES MEYER, Trustee;
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H. T. MAROON, Trustee, otherwise known as Hoke T. Maroon, Trustee;
SEABOARD FINANCE COMPANY OF FLORIDA, a corporation;
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The Respondents were the successful Defendants in the trial court and the successful Appellees in the United

States Court of Appeals for the Fifth Circuit, *Peckham v. Family Loan Company et al.*, 262 F. 2d 422.

In this brief the parties will be referred to as they stood in the trial court, and the following symbols will be used:

RV, Record printed in Appellate case 13,488;
RV1, Record Volume 1, for the printed record in Appellate Cause No. 14,410;
RV2, Record Volume 2, for the printed record in Appellate Cause No. 16,871, the decision in which the Petitioners seek to have reviewed;
Tr., for the mimeographed transcript of testimony and proceedings in the trial court;
PlX for Plaintiffs' exhibits;
PtA for Petitioners' appendix;
Res A for Respondents' appendix;
Pet. for Petition for Certiorari.

QUESTION PRESENTED.

Alleged Basis for Review:

The Petitioners contend, basically, that the trial judge, Honorable Edgar S. Vaught, District Judge, was biased and prejudiced against the Plaintiff and Intervenor throughout the trial and that

"that bias and prejudice of the trial judge *throughout the trial* rendered the trial abortive and unjust and requires a new trial," (Pet. 7), and that the Court of Appeals' opinion so far sanctioned the alleged bias and prejudice as to call for the exercise of this court's power of supervision.

The limited basis of the Petition is again stated:

> "While the factual and legal merits of the case are *not* here for review *as such*, it is proper for this court to *briefly* notice the Trial Transcription, which has been certified up, sufficiently to see that from the *beginning* to the end the trial was saturated with *prejudice* of the trial judge against this Petitioner-Plaintiff and *sympathy* in favor of these Respondents-Defendants, sufficient to make the trial abortive." (Pet. 9).

The Plaintiff and the Intervenor expressly state, in their petition, that they do not ask this court to review the merits of the evidence, findings of fact, or conclusions of law of the District Court (Pet. 2).

STATEMENT OF THE CASE.

While the Plaintiff and the Intervenor complain only of the alleged prejudice of the trial judge, we believe that a synopsis of the pleadings and the history of the case preceding the trial is material to the consideration of the question presented and present the following for the information and assistance of the court:

The Plaintiff brought a Creditor's Bill based on a judgment against Sol Meyer, and the Intervenor presented a claim in the nature of a Creditor's Bill based on a judgment against Ferd S. Meyer (son of Sol Meyer).

The Judgment Against Sol Meyer:

The Plaintiff's predecessor, Thomas E. Garvin, Receiver of the Meyer-Kiser Bank at Indianapolis commenced an action, in the state courts of Indiana, against Sol Meyer on November 16, 1933, alleging a misapplication of the funds of the bank and obtained a judgment against

Sol Meyer on October 18, 1938, which after remittitur, amounted to over eight hundred thousand dollars and thereafter, upon the basis of that state judgment, commenced a suit in the United States District Court for the Southern District of Florida against Sol Meyer and recovered a personal judgment against him on January 30, 1939. Sol Meyer died on November 18, 1939, leaving no assets.

The Complaint:

On March 1, 1949, Plaintiff as trustee for the creditors of the Indianapolis bank filed this suit. The amended Complaint, as against these Defendants, is a Creditors' Bill seeking to reach certain personal property identified as the stock, debenture, and evidences of indebtedness of Family Loan Company. Plaintiff's theory is that Thomas E. Garvin, Receiver of the Meyer-Kiser Bank of Indianapolis, obtained a judgment against Sol Meyer and that while Sol Meyer was indebted upon the matters resulting in the judgment, he furnished the capital for and organized Family Loan Company and lent or furnished additional money or property actually belonging to him to said corporation and caused the stock, debentures, or other evidences of indebtedness of said company to be issued or transferred to the individual and Trustee Defendants who paid nothing therefor but held the same for and in behalf of Sol Meyer and that these conveyances were voluntary conveyances by Sol Meyer and that he and the individual and Trustee Defendants engaged in those transfers for the purpose of defrauding the said judgment creditor and that said judgment had been assigned to the Plaintiff. He alleges that neither the Plaintiff nor his assignee discovered, learned, or had knowledge of the facts constituting the alleged fraud until during a period of less than three years immediately prior to the filing of the action.

The supplemental Complaint alleged that the individual Trustee Defendants and other non-Defendants owning stock in Family Loan Company sold all of the outstanding stock in that company to Seaboard Finance Company in April, 1953, during the pendency of the second appeal.

The Judgment Against Ferd Meyer:

On September 20, 1932, the liquidator of Meyer-Kiser Bank of Miami obtained a judgment against Ferd S. Meyer (son of Sol Meyer) upon a stockholders assessment, and on September 18, 1933, Ferd Meyer filed proceedings in voluntary bankruptcy scheduling that judgment as one of his liabilities (RV1, pp. 234, 345). He was adjudged bankrupt on September 18, 1933, and discharged in bankruptcy on March 13, 1934 (RV1, pp. 364, 393). The liquidator of Meyer-Kiser Bank of Miami held a public sale of the remaining assets of the bank and on March 22, 1938, sold a group of assets and claims, including the judgment against Ferd Meyer, to Augusta Holding Corporation (RV1, p. 276). That company had investigated Ferd Meyer and the bankruptcy and regarded the judgment as worthless and in making its offer for the purchase of the assets, had assigned no value to the judgment (PlX 82-b, Tr. pp. 1438-1440).

The Assignment to Peckham:

In early February of 1947 Mr. Peckham, through an agent, approached the Director-Trustees of Augusta Holding Corporation, a dissolved Florida corporation, and proposed that they assign the judgment to him in trust under an agreement whereby he as assignee for the creditors for Meyer-Kiser Bank at Indianapolis would pay all expenses of litigation and would furnish counsel and would commence litigation against Ferd Meyer seeking to enforce

the judgment, and if any sums were recovered, either under the judgment against Ferd Meyer or under the judgment held by him against Sol Meyer, the proceeds would be divided *pro rata* according to a ratio agreed upon (Tr. pp. 1440-1441, PlX 82b). The Trustees of the Augusta Holding Corporation agreed to the proposition, and on the 14th of February, 1947, a trust agreement contract setting forth the foregoing was entered into (Tr. pp. 1438; PlX 82a).

Theory of Intervenor:

That Ferd S. Meyer became indebted to the Meyer-Kiser Bank of Miami on May 12, 1931, the day the bank closed, by reason of the stockholders' double assessment liability, by reason of which the judgment against Ferd S. Meyer was obtained which remains wholly unsatisfied. Intervenor alleged that while Ferd S. Meyer was liable to the bank on the obligation for which the judgment was recovered, made transfers, manipulations, and concealments of his assets with intent to cheat, hinder, delay and defraud his judgment creditor. That while Ferd S. Meyer was the owner or purported owner of a substantial part of the stock, notes, debentures, or other evidences of indebtedness of Family Loan Company, he caused or knowingly permitted the same to be issued or transferred to the names of the individual and Trustee Defendants and that he and the other Defendants have continued to manipulate and conceal the assets of the said Ferd S. Meyer and prevent them from being applied to the satisfaction of the judgment. The Intervenor alleged that he was the owner of the judgment because of the assignment to him as trustee.

In the supplemental intervening claim the Intervenor alleges that the individual and Trustee Defendants and

other non-Defendants owning stock in Family Loan Company sold all of the outstanding stock in that company to Seaboard Finance Company in April, 1953, during the pendency of the second appeal, which was an appeal taken by the Intervenor.

Defendants' Defenses to Complaint:

Each of the Defendants replied that Sol Meyer did not organize Family Loan Company and that no money or assets of Sol Meyer caused or procured any stock, debentures or evidences of indebtedness of the company to be issued. Defendants deny entering into any conspiracy with Sol Meyer to conceal any of his assets and denied that they held or ever held any assets which equitably belonged to Sol Meyer. They further answered that the stock and debentures of Family Loan Company held by them were their individual property and that their title was not traceable in any manner to Sol Meyer or to any person acting for or on his behalf. The Defendants admitted that they had sold their stock in Family Loan Company to Seaboard Finance Company but contend that the stock belonged to them and they had every right to deal with their own property as they saw fit.

Defendants' Defenses to Intervenor's Claim:

Each of the Defendants replied that Ferd S. Meyer had filed voluntary bankruptcy proceedings and had listed the judgment as one of his liabilities and that Ferd S. Meyer had been discharged in bankruptcy and that no money or assets of Ferd S. Meyer had gone into Family Loan Company prior to his discharge in bankruptcy and that at no time prior to the bankruptcy did any of the Defendants hold any money or assets in behalf of Ferd S. Meyer. The Defendant Ferd S. Meyer replied that he had

filed bankruptcy proceedings listing all of his assets and liabilities, among such liabilities listed being the judgment in question and that he had been discharged in bankruptcy and that said discharge discharged his liability on the said judgment. He further replied that he concealed none of his assets in the bankruptcy proceedings and that no money or other assets of his had gone into the Family Loan Company prior to his bankruptcy and that no person, prior to his discharge in bankruptcy had held any stock or debentures or other evidence of indebtedness of said company for and in his behalf. Each of the Defendants further replied that their holdings in said company were their own property and that they were not in any way responsible for the judgment held by the Intervenor. The Defendants also replied that the Intervenor's claim was champertous because the basis of the Intervenor's claim was the champertous Trust Agreement under which he claimed the right to maintain the action in intervention.

Historical Status of Case:

The trial judge was faced with certain undisputed facts of record which we bring to the attention of this court in chronological order as follows:

1. *Family Loan Co.*, charter issued March, 1930 (Tr. p. 145, PlX1).

2. Meyer-Kiser bank of Indianapolis, closed May 12, 1931 (RV1, p. 2).

3. Meyer-Kiser Bank of Miami, closed May 12, 1931 (RV1, p. 274).

4. Judgment against Ferd S. Meyer, upon stockholders' assessment, recovered by Liquidator of Meyer-Kiser Bank of Miami on September 20, 1932 (RV1, pp. 273-274).

5. *Florence S. Meyer Trust created on January 16, 1932*, recorded in Marion County, Indiana, November 28, 1932 (RV1, pp. 222-234).

6. Ferd S. Meyer filed Bankruptcy on September 18, 1933 (RV1, p. 234).

7. Liquidator's judgment against Ferd S. Meyer listed in Bankruptcy Schedule (RV1, p. 345).

8. Ferd S. Meyer adjudged bankrupt September 18, 1933 (RV1, p. 364).

9. Ferd S. Meyer discharged as bankrupt March 13, 1934 (RV1, p. 393).

10. Sale and assignment of judgment against Ferd S. Meyer by Liquidator of Meyer-Kiser Bank of Miami by Augusta Holding Corporation, March 22, 1938 (RV1, p. 276).

11. Judgment against Sol Meyer recovered by Thomas E. Garvin, Receiver of the Meyer-Kiser Bank of Indianapolis, in District Court of the United States, Southern District of Florida, Miami Division, on January 30, 1959 (RV1, pp. 11-12).

12. *Sol Meyer died November 18, 1939* (stipulated date) (RV2, p. 91).

13. Thomas E. Garvin, Receiver of the Meyer-Kiser Bank of Indianapolis, filed Chancery Cause No. 63001 against Ferd S. Meyer as Trustee for Edward Meyer, Sol Meyer, Jr., and James M. Meyer and Ferd S. Meyer, individually, in the Circuit Court of the 11th Judicial Circuit of Florida in May, 1940. Final Decree dismissing the cause with prejudice entered September 25, 1943 (RV1, pp. 102-243).

14. Assignment of judgment against Sol Meyer by Thomas E. Garvin, Receiver of Meyer-Kiser Bank to Plaintiff on March 21, 1944 (RV1, pp. 16-17).

15. Assignment of judgment against Ferd S. Meyer by Trustees of Augusta Holding Corporation, a dissolved corporation, to Intervenor on February 14, 1947 (RV1, pp. 277-279).

16. Trust Agreement between Trustees of Augusta Holding Corporation, a dissolved Florida corporation, and Intervenor, dated February, 1947, providing that Intervenor furnish costs and counsel for litigation and divided proceeds (PlX 82-a and 82-b, TTl, pp. 438-1441).

17. *Plaintiff commenced this suit March 1, 1949* (RV1, p. 1).

18. Defendants filed answers May 9, 1949 (RV1, pp. 70-258).

19. Plaintiff filed Motion for leave to examine books and records *September 15, 1950* (RV1, p. 82).

20. Order dismissing Plaintiff's suit entered November 22, 1950 (RV1, pp. 298-301).

21. Plaintiff appealed and the Order of Dismissal was reversed (Appellate Cause No. 13,488), reversing Mandate filed August 14, 1952.

22. Intervenor's Motion for leave to intervene heard November 29, 1952. Final order denying Petition to Intervene entered December 16, 1952.

23. Intervenor appealed (Appellate Cause No. 14,410) and Mandate reversing order denying Petition to Intervene filed June 7, 1954 (RV2, p. 2).

24. Order setting aside former order and permitting intervention entered October 25, 1954 (RV2, p. 19).

25. Supplemental complaint filed October 25, 1954 (RV2, p. 12).

26. Supplemental intervening claim filed October 25, 1954 (RV2, p. 14).

27. Answer to intervening claim and supplemental intervening claim filed *November 16, 1954* (RV2, p. 20).

28. Answer to supplemental amended complaint filed *November 19, 1954* (RV2, p. 34).

29. Answer to amended complaint and supplement thereto and intervening claim and supplement thereto filed November 19, 1954 (RV2, p. 34).

30. Notice of Trial filed November 7, 1956, setting case for trial on February 25, 1957 (Appendix A, Appellants' Brief).

31. Order setting Pretrial Conference filed January 10, 1954 (RV2, p. 69).

32. Pretrial Conference, January 31, 1957, with Transcript of Proceedings (RV2, p. 81).

33. Plaintiff's Motion for Continuance filed February 21, 1957 (RV2, p. 112).

34. Order denying Motion for Continuance dated February 21, 1957 (RV2 p. 135).

35. Trial before Honorable Edgar S. Vaught, Judge, *opening day* February 25, 1957 (TT, Cover Volume 1).

36. Trial ends at 5 p.m. March 12, 1957 (TT1, p. 462).

37. Trial decision March 13, 1957 (TT1, pp. 469-1475).

38. Opinion filed March 19, 1957 (RV2, pp. 152-163).

39. Findings of facts, conclusions of law, and order of dismissal filed March 19, 1957 (RV2, pp. 164-172).

Trial Setting and Pretrial Conference:

On November 7, 1956, the Clerk of the United States District Court for the Southern District of Florida gave notice that the case was set for trial at Miami, Florida, on February 25, 1957, at 9:30 a.m., before Judge Edgar Vaught, main post office building (Appendix A, Appellants' Brief, Appellate Case No. 16,817), and on January 10, 1957, the Honorable Emmett C. Choate, United States District Judge, entered the order setting a pretrial conference before that judge in his chambers at 3 o'clock p.m. on the 25th day of January, 1957, with copies to counsel for all parties (RV2, p. 69).

Counsel for Plaintiff and Intervenor could not attend (RV2, p. 93), and the pretrial conference was held over until January 31, 1957 (RV2, p. 80). At that time the Plaintiff advised the court of an undisposed motion, *filed by the Plaintiff on September 15, 1950*, seeking permission to examine the records and accounts of the Family Loan Company, as respects its dealing with Sol Meyer during his lifetime. During that conference the court observed

> The Court; "You can tell the court up there that this court was set and is the oldest case on our docket, it is seven years old and we are going to try it unless some very, very pertinent reason is presented why it should not be tried." (RV2, p. 108).

The court required service of lists of intended exhibits, the Plaintiff being required to submit his list of intended exhibits eight days prior to the trial date and Defendants seven days prior to trial date (RV2, p. 110) and notified all counsel that

> The Court: "Well, nothing less than a formal notice for continuance will be considered further and that will have to be an affidavit in all formality and I will rule on it as quick as I get it. I will do that

so none of you will be up in the air. I do not know of anything else that we can do about it. Counsel, it is my intention to try this case unless there is some very, very good reason that has not been mentioned so far or brought up." (RV2, p. 109).

Motion for Continuance and Order Thereon:

On February 21, 1957, Plaintiff filed his Motion for Continuance (RV2, p. 112). The Motion came on for hearing on that day before the Honorable Emmett Choate, United States District Judge. In denying the Motion for continuance, the court said

The Court: "Well, as I told Mr. Darlington here, I am always anxious to oblige counsel from other states. But on the other hand, this particular case is the oldest case that I know of in this Court. I think it is about seven years old. This Court calendar is crowded. I cannot pick it up and put it in another week or another month without causing a lot of confusion and a lot of difficulty. It is true that he may have engagements in other courts, but apparently this engagement is first. And I think those other courts, at least I would if such were the case, should have the courtesy to step aside for this engagement, if this case runs over.

Now, of course, if there are records in Puerto Rico, it is only a matter of a few hours to go to Puerto Rico, if somebody wants to go over there to pick up the records. He certainly must know over the years what records he will need in this case. Of course, he certainly can order them from Puerto Rico and have them sent up. I am going to deny the continuance for those reasons and for the further reason that I think that justice must be served by prompt litigation.

I think that too often courts and lawyers, too, fall into the bad habit—I do not think they do it knowingly or deliberately—by delaying causes unduly. It makes

it more complicated and it often defeats justice. Certainly, these Defendants have a right to complain and they have a right to have their day in court and be rid of this case, whichever way it falls."

SUMMARY OF RESPONDENTS' ARGUMENT.

The trial judge, Honorable Edgar S. Vaught, retired United States District Judge, Western District of Oklahoma, Tenth Circuit, presided at the trial and the decision of the case, under assignment by Chief Justice Earl Warren of the United States Supreme Court by designation dated December 12, 1956, for the period beginning February 25, 1957, and ending March 22, 1957.

The trial judge was unacquainted with counsel for the Plaintiff and Intervenor and, likewise, did not know counsel for the Defendants. He knew nothing about the case at bar until the day of the trial at which time he met counsel for the first time and heard of this case for the first time.

Since the trial judge was a stranger to the parties and to counsel, it is impossible for the trial judge to have had any preconceived bias or prejudice for or against any of the parties or counsel. These Defendants, Respondents herein, contend that the trial judge exhibited no bias or prejudice against either the Plaintiff or the Intervenor and did not prejudge the case, or make any improper comment during the trial, nor was he guilty of any improper conduct.

The Plaintiff and the Intervenor neglected to prepare for trial. The neglect of the Plaintiff existed from August 14, 1952, when the case was reinstated by a reversing mandate issued by the appellate court, to February 25, 1957, the date on which the trial commenced. The neglect of

the Intervenor existed between November 19, 1954, when the cause became at issue, to the date of the trial, February 25, 1957.

Neither the Plaintiff nor the Intervenor ever attempted to take any pretrial depositions or discovery from any witness or party. The Plaintiff filed a motion for leave to examine the books and records of the Defendants on September 15, 1950, but did not call the motion up for hearing until January 31, 1957, at the Pretrial Conference. As the result of this negligent failure to prepare for trial, Plaintiff and Intervenor had no evidence to present at the trial and attempted to conduct a discovery proceeding under the guise of conducting a trial of the issue. This conduct on the part of the Plaintiff and the Intervenor required the trial judge to keep the "discovery" within the bounds of reason, to interrogate the witnesses from time to time, in order that the court might itself keep the evidence clear in its mind, and to comment from time to time upon the status of the progress of the case. We submit that the trial judge only performed his duty and sought to conduct the trial in an orderly way with a view to eliciting the truth and attaining justice between the parties.

The contention that Plaintiff and Intervenor did not receive a fair trial because of the alleged bias and prejudice of the Trial Judge was thoroughly considered by the United States Court of Appeals for the Fifth Circuit which reached the conclusion that the trial judge was guilty of no improper conduct or comment.

The Plaintiff and the Intervenor had ample opportunity at the trial to present evidence of fraud if any such evidence existed, but they had none, and the evidence they did produce showed that no fraud existed except in their imagination.

Since the trier of facts found against them because of the failure of their proof and the Appellate Court affirmed the Trial Judge, the Petitioners now seek to try both the Trial Judge and the Appellate Court instead of the merits or demerits of their cause.

ARGUMENT.

At the outset we concede that a fair trial by an unbiased and nonpartisan trier of the facts is of the essence of the adjudicatory process. A litigant is entitled to a fair trial in a fair tribunal and that fairness requires an absence of *actual* bias or prejudice in the trial of the case.

However, the bias or prejudice which would disqualify a judge and render a trial unfair, must be a "personal" bias or prejudice as distinguished from a judicial one. *Craven* v. *United States*, 1st Cir., 22 F.2d 605, 607-08. It is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally. *Price* v. *Johnston*, 9th Cir., 125 F.2d 806, 811; *Eisler* v. *United States*, 83 U.S. App. D. C. 315, 170 F.2d 273, 278. Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law. *Lowes', Inc.* v. *Cole*, 9th Cir., 185 F.2d 641, 642.

A trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth and to attain justice between the parties. It is his duty to see that the issues are not obscured. *Fidelity Deposit Co. of Maryland* v. *Bates*, (8th Cir.) 76 F.2d 160, 170.

Trial Judge Meets Counsel and Parties:

On page 10 of the Petition the Plaintiff and Intervenor state that the judge entered the case as a special judge, "a *stranger* to this Petitioner-Plaintiff" on the morning the trial started. Since the Petitioners *allege* that the trial judge was biased and prejudiced *throughout the trial*, we assume that this is an attempt on their part to insinuate that the trial judge was not a stranger to the Defendants and their counsel.

The record (Tr., p. 2) shows that at the opening of the trial the court asked whether the parties were ready, and thereupon Mr. Leo Julian stated that chief counsel for the Plaintiff, Mr. Darlington, had informed him that they were ready and introduced himself to the court and then introduced Mr. Darlington to the court and lastly introduced Mr. Howell, an associate, to the court. The record shows that Mr. Budd introduced himself and Mr. Ward as counsel for all of the Defendants except the Defendant, Seaboard and announced that the Defendants were ready, and thereupon Mr. Ponstel introduced himself and his associate, Mr. Dyer, and another associate, Mr. Chadwick, stating that they represented Seaboard Finance Company and that that Defendant was ready.

The record, by its silence, shows that the Plaintiff and the Intervenor, Mr. R. E. Peckham, was never in attendance at the trial and, therefore, remained a stranger to the court throughout the trial of the case. Incidentally, Mr. Peckham remains a stranger to the Defendants as well since he never appeared in person at any time during any of the proceedings. The Defendants sought to make his acquaintance very early in the case by filing a notice for the taking of his deposition (RV1, p. 21), but this notice was quashed at the request of Plaintiff's counsel on the 10th day of March, A.D., 1949 (RV1, p. 57).

After the introductions the court requested that Plaintiff make a statement of his case (Tr. 3), and Plaintiff's chief counsel, Mr. Darlington, responded. Page 8 of the Transcript shows that Plaintiff's counsel commenced to talk about another case filed and then progressing in Puerto Rico. Counsel for the Defendants (Tr. 10), objected to this, but the court overruled that objection, and listened to the recital of the issues and history of the Puerto Rico case. When the Defendants again objected (Tr. p. 13), the court denied the objection and observed:

> "I just want to find out what the law suit is about."

Counsel continued his opening statement to page 53 of the Transcript, and the court adjourned until 9:30 of the following day. On the morning of February 26 counsel for Defendants made its opening statement, and at the close the trial proceeded. Plaintiff called one of the Defendants, Mr. Ferd S. Meyer, as witness for the Plaintiff, and he remained on the witness stand throughout the day. On the morning of February 27 (Tr. 211), at the opening of court, the Trial Judge announced:

> "Gentlemen, I do appreciate the fact that the court never heard of this case or the parties until the trial started. However, I have read the decision of the Court of Appeals of the Fifth Circuit and also the opinion of the state court in Indiana. I have that information. There are three questions I think that are very important in this case."

The three questions posed by the judge were as follows:

(1) What interest did Sol Meyer have in the Family Loan Company?

(2) What interest did Ferd Meyer have in the Family Loan Company?

(3) What fraud did Ferd Meyer commit in the bankruptcy proceedings?

We submit that, in view of the record, it would be physically impossible for the Trial Judge to have entertained a prejudice or bias against the Plaintiff or against the Intervenor "throughout the trial" as charged by the Petitioners.

Trial Judge Did Not Assume the Role of Defense Counsel:

The Plaintiff and Intervenor charge (PtA 18), that the Trial Judge assumed the role of defense counsel and on the appendix pages 18 and 19 partially quote from Tr. 108-109.

The Defendants' pleadings, which by this time the Trial Judge had read, and the Defendants' opening statement informed the court that it was the Defendants' position that Florence Meyer, who was the wife of the deceased judgment debtor Sol Meyer, the mother of Defendant Ferd S. Meyer, the mother of two mentally retarded, incompetent sons, Sol Meyer, Jr., and Edward Meyer, possessed independent means, and organized the Family Loan Company and furnished all of its original capital out of her own separate estate. That later, on the 16th of February, 1932, from her separate estate, she formed the Florence Meyer Trust for the benefit of her two incompetent sons, Sol Meyer, Jr., and Edward Meyer, and for her grandson, James Meyer, who was only incompetent by reason of minority. The full sequence of related questions which preceded the court's interrogation, which is complained of, is as follows:

Q. Your mother was never an officer of the Miami bank, was she?

A. I don't recall it. I don't recall who the officers were.

Q. Your mother never was any officer of the Indianapolis bank so far as you recall either, was she?

A. I don't recall. She may have been. I think she was a director, but I don't know that.

Q. Your mother did not hold any substantial amount of stock in the Indianapolis bank as far as you recall, did she?

A. I don't know who the stockholders were; so I wouldn't know whether she did or not.

Q. How about yourself? Did you hold any stock in it?

A. I don't think so. I don't know. I don't believe I did. I may have.

Q. Your mother, I take it, was the housewife and homemaker as far back as you recall and did not engage in business as far back as you can remember? is that true?

A. Do you mean go to work every day? Is that what you're talking about?

Q. No, I did not necessarily mean to go to work every day.

A. I know she had money that she invested in various things.

Q. I am not talking about investments. I mean, did she engage, take part in any kind of business that you recall?

A. I don't recall her having any regular job any place.

Q. You do recall that regularly she was home taking care of the family? Is that a correct statement?

A. That was her primary business, yes.

The Court: Do you recall whether or not your mother had an independent estate at that time?

The Witness: Yes, she did.

The Court: Her parents were wealthy people?

The Witness: They were.

Q. Mr. Meyer, from what source did she get this independent estate?

A. I don't know.

The Court: Did she inherit it from her parents or did she—

The Witness: I do not know, Your Honor. I know she was a very thrifty woman and I know she saved her money. Where she may have accumulated monies from, I don't know and I never did know. I know she always had monies that she was willing to give me when my father turned me down (Tr. pp 107, 108, 109).

Since the question of whose money organized Family Loan Company was one of the issues, when the witness testified that he knew that Florence Meyer "had money and that she invested in various things," when counsel for Plaintiff-Intervenor announced that he was not "talking about investments" and failed to pursue the pertinent inquiry, the Trial Judge had the right to interrogate the witness on that very pertinent point, *Hargrove* v. *United States*, 8th Cir., 25 F.2d 258, and these Respondents, like the United States Court of Appeals for the Fifth Circuit, can discover nothing improper in the court's interrogation, and we believe the preceding quotation of the pertinent record shows the complaint of Petitioners to be unjustified.

However, at this point, these Defendants do wish to observe that there is nothing in the record and nothing occurred during the trial which justifies the Petitioners in emphasizing words and phrases in the manner shown in their appendix. Neither counsel for the Plaintiff-Intervenor nor the witness nor the court placed the emphasis on the questions or answers as they appear in the appendix.

The impartiality of the Trial Judge and his interest in learning the facts and his attempt to do his duty and

see that the issues were not obscured was demonstrated by the following questions:

> The Court: Do you know where the money came from that went into that trust?
>
> The Witness: From her own savings, investments or accumulations. That was set up—
>
> The Court: Did your father contribute anything to that trust so far as you know?
>
> The Witness: I know that he never put anything in after the trust was organized. I don't know whether he gave my mother any of that money or not. He may have over a period of years.
>
> The Court: This was organized when? I refer to the trust.
>
> The Witness: I think it was organized in 1930 or '31 when she was alive (Tr. pp. 131-132).

Obviously, those questions were pertinent to the issues and completely within the province of the Trial Judge.

Judge Did Not Exhibit Bias nor Prejudge a Major Issue:

On page 19 of the Petitioners' appendix, the Plaintiff-Intervenor, no doubt inadvertently, misquoted the record by stating: "The Court: (To Plaintiff's counsel during direct examination of same witness Ferd S. Meyer)." We submit that the record shows the above statement to be made in error, if it was intended to convey the impression that the court interrupted Plaintiff's counsel during direct examination.

Immediately following the last quoted questions by the court and the answers by the witness, one of the counsel for the Defendants arose to address the court, and the following took place:

Mr. Budd: Your Honor, if you will permit me to clarify your mind, in all of these pleadings *there has never been an allegation that Sol Meyer ever gave Florence Meyer a nickel. There is no charge of any conspiracy between Sol Meyer and Florence Meyer to conceal any asset of Sol Meyer* (Emphasis supplied).

The reason for such failure of allegation is very simple. The Florence Meyer Trust has been a matter of public record in Indianapolis since 1932, I believe, November of 1932. The plaintiff knows that he cannot successfully claim to be in ignorance of the existence of that trust and, therefore, that was the reason the plaintiff failed to make any such allegations.

Mr. Darlington: May I clear the record here by calling to Mr. Budd's attention and to the Court's attention the fact that Ferd S. Meyer, trustee of this very trust or, rather, successor trustee, as I recall, is a defendant in this action. He is the defendant both individually and as trustee of this very trust. The complaint alleges generally that all of the defendants conspired to carry out this program of concealment.

The Court: Is it your contention now that any part of this Florence Meyer Trust, the capital of that trust, came from the bank or from Sol Meyer?

Mr. Darlington: It is our contention that every penny that was ever in it, except maybe a little jewelry of slight value, was Sol Meyer's money and was put in—

The Court: That is perhaps an imaginative result. There is no evidence so far that that occurred.

Mr. Darlington: There will be a good deal of circumstantial evidence, we think, as the case moves along.

The Trial Judge may and should take an active part in the examination of witnesses if he considers that the course of justice requires it. It is his function to elicit all material evidence and assist in making straight the path

of Justice. *Montrose Contracting Co. v. Westchester County*, 2nd Cir., 94 F.2d 580, 583.

He has the authority to express his opinion upon the weight of the evidence. *Fidelity Deposit Co. of Maryland v. Bates*, 8th Cir., 76 F.2d 160, 170.

The record thus shows, contrary to Plaintiff's statement, that the court did not interrupt the examination of the witness, but on the contrary, merely directed a question to counsel for the Plaintiff following a statement by that counsel as to the extent of Plaintiff's contention with respect to the Florence Meyer Trust. The court's comment that there is no evidence *so far* to support the contention, which Plaintiff's counsel had expressed, is a mere comment upon the evidence which had been produced prior to that point in the trial. Most counsel would have been grateful to the court for indicating his opinion as to the weight of the evidence up to that point since it permitted counsel to promptly present evidence which would actually support the contention, but as we see, at the trial, counsel for Plaintiff contented himself with making the observation and promise that he would introduce evidence supporting his contention. Certainly the record does not bear out Plaintiff-Intervenor's charge that the Trial Judge had exhibited bias and prejudged a major issue.

Next Charge of Judicial Bias:

On page 20 of the Petitioners' appendix, Plaintiff-Intervenor again charges that the judge exhibited bias in favor of the Defendants.

Late in the afternoon of February 28, 1957, counsel for Plaintiff-Intervenor, having introduced the original bound minute book of Family Loan Company covering the period from its inception on April 1, 1930, through Septem-

ber 19, 1942, as Plaintiff's Exhibit 1 (Tr. p. 147), after having indulged in minute and exhaustive cross-examination as to each preceding page in the exhibit, produced the following questions and answers preceding the portion of the record which Petitioner claims demonstrates judicial bias in favor of the Defendants (Tr. pp. 167-170):

Q. I now turn to page 109. These are the minutes of the annual meeting of stockholders. This is on April 1, 1933. It says "The following stockholders were present in person: Rosalyn A. Meyer, forty-seven shares; W. C. Chadwick, one share; A. M. Reder, one share; Ferd S. Meyer, one share." That is the way the typewriting reads. Then there is the name of W. C. Chadwick that has been crossed out with a pencil. Did you cross that out?

A. No, sir.

Q. Do you have any idea as to who did?

A. No, sir.

Q. Do you have any idea as to the reason?

A. No. It looks to me that whoever made this up found that the list was incorrect and said "see minutes attached."

Q. We will come to that in a minute, and we will put that off just so that we do not lose the continuity.

Would you say, if you know, whether or not Chadwick's name was deleted because it was found that he was not present?

A. I don't know.

Q. You do on the second page of those minutes, page 110, recognize Chadwick's signature?

A. Yes.

Q. And Maroon's signature as secretary?

A. Yes.

Q. The next name on the list was typed was A. M. Reder, and that is deleted with a pen and written there in place of it with a pen is the name of H. T. Maroon. Did you write that?

A. No, sir.

Q. Do you recognize the hand?

A. No, sir.

Q. The next name that was typed is Ferd S. Meyer. There has been added with a pen the word "trustee." Did you write that in?

A. No, sir.

Q. Do you recognize who did?

A. No, sir.

Q. You do not know?

A. No.

The Court: Are those stockholders' or directors' meetings?

The Witness: Stockholders, yes.

Mr. Darlington: This, Your Honor, is the annual meeting of stockholders, of April 1, 1933. That is the date fixed in the by-laws for the annual stockholders' meeting. Some of the others to which I have referred in the past have been directors' meetings.

The Court: I understand that.

Q. You started to mention a moment ago that there is written with a pencil opposite the name of Reder and Mr. Maroon the words "(see minutes attached)." That is in the handwriting of Hoke T. Maroon, is it not? I refer to this pencil notation.

A. I couldn't say for sure that it is.

Q. As a result of a long association with Mr. Maroon are you not able to state whether in your best judgment that is Mr. Maroon's handwriting?

A. It could be. It is similar to his handwriting —the words "see minutes attached."

Q. Then there is a pencilled bracket there. Do you see that?

A. Yes.

Mr. Darlington: For the record, there is a pencil line drawn to the right of the penned in name of Mr. Maroon and there is a bracket enclosing the one share

opposite Maroon's name and one share opposite Reder's name.

Q. That is a correct description, is it not?

A. Yes.

Q. And following that are these pencilled words "see minutes attached"?

A. That's right.

Q. Are you able to give us any explanation as to why Chadwick signed the minutes as chairman which you identified on the second page and then his name had been crossed out of the list of those present?

A. No, I can't. He may have been present. It occurs to me that that's about the time Mr. Maroon was taking over the active operation of the Family Loan Company from Mr. Chadwick. Mr. Chadwick had been more or less the supervisor up to then, and I think from that time forward Mr. Maroon took over (Tr. pp. 167-170).

The record (Tr. pp. 145-146), shows that the minute book, Plaintiff's Exhibit 1, includes two pages of title history of the common stock of Family Loan Company with a table showing the history and dates of transfer of stock from April 1, 1930, down to April 20, 1949. That portion of the exhibit shows that Certificate No. 2 was originally issued on April 20, 1930, to W. C. Chadwick for one share and was cancelled and reissued as Certificate No. 12 on April 1, 1933, for one share to H. T. Maroon. The table shows that Certificate No. 3 was originally issued for one share on April 20, 1930, to A. M. Reder, and that this certificate was cancelled and reissued as Certificate No. 11 for one share in the name of H. T. Maroon on April 1, 1933. It also shows that Certificate No. 4 for one share was issued to Ferd S. Meyer on April 20, 1930, and that this certificate was cancelled and reissued, as Certificate

No. 10, for one share on January 20, 1932, in the name of Sol Meyer and Ferd S. Meyer, trustees for Sol Meyer, Jr., Edward Meyer, and James Meyer, *i. e.*, the Florence Meyer Trust.

In Defendants' opening statement the court was informed that Florence Meyer told her son Ferd S. Meyer, that she wanted the corporation to be organized with Ferd Meyer, W. C. Chadwick, and A. M. Reder as the subscribing incorporators, the charter providing that Ferd Meyer subscribe to 98 shares, W. C. Chadwick to one share, and A. M. Reder to one share. The opening statement disclosed that when the charter was issued, Mr. A. M. Reder, who was the attorney handling the matter and who was named secretary in the charter, prepared Certificate No. 1 for 98 shares to be issued to Ferd Meyer, Certificate No. 2 for one share to be issued to W. C. Chadwick, and Certificate No. 3 for one share to be issued to A. M. Reder, and that the issuance of the shares was disclosed to Florence Meyer who was the true owner of all of the shares, and thereupon she objected and instructed the incorporators that she wished Share No. 1 to be cancelled and reissued with one share to Ferd Meyer and 97 shares to be issued in her own name (Tr. pp. 65-66). That statement further disclosed that the Defendants admitted that Chadwick, Reder, and Ferd Meyer held Certificates Nos. 2, 3, and 4, each for one share, as the nominees for the true owner, Florence Meyer, who thereafter on the 16th day of February, 1932, created the Florence Meyer Trust, and those shares were then held as the nominees for the true owner of the stock, to-wit: The Florence Meyer Trust (Tr. p. 68). Four days later, on January 20, 1932, Ferd Meyer transferred the share standing in his name to the Florence Meyer Trust (Tr. p. 69).

So the witness was merely explaining to counsel for the Plaintiff that on that date Mr. Maroon had taken over the active operation of the company and had likewise taken over the two shares of stock so that he became the nominee for the true owner, the Florence Meyer Trust. At this point followed the exchange between the Trial Judge and Plaintiff's counsel concerning which the Petitioners now complain (Tr. pp. 170-172):

> The Court: How is that material?
>
> Mr. Darlington: Your Honor, in this kind of a case a plaintiff cannot expect any direct admissions against interest by the witness and—
>
> The Court: You ought to base it on something other than just mere suspicion, you know.
>
> Mr. Darlington: It is something other, and let me refer Your Honor to that famous statement of Justice Storey which is quoted in so many of the cases to this effect: Concealment and secrecy are the handmaidens of fraud.
>
> Very seldom can a plaintiff produce direct proof or testimony of fraud, but circumstances which may appear trivial in themselves may in their co-relation with other circumstances in the case ultimately produce conviction exceeding all testimony.
>
> The Court: While that is very important, nothing is more important than to charge a man with fraud unless you are able to prove it.
>
> Mr. Darlington: I consider that the charges were well-founded at the time the complaint was filed, and as my investigation proceeds and the evidence develops, I am increasingly convinced of that and I hope to be able to convince Your Honor. Of course, it would not have been appropriate for me in the opening statement to list a great many separate details that I expected—
>
> The Court: There is nothing in what you have produced here this afternoon getting down to facts.

There is not a single statement there which you could construe as fraud in any way.

Mr. Darlington: It is not merely the written statements. It is the fact that there is a certain pattern of alterations. I am not asking Your Honor to make a finding upon these alone. Naturally, I expect to produce a further pattern of alterations and circumstances arising partly from the records of the defendants and partly from their testimony, the circumstances contained in their testimony.

The Court: Very well. Let us get along and let us have the evidence.

Since the record, which was before the Trial Judge, showed that on April 1, 1933, the stockholders of Family Loan Company were:

Sol Meyer and Ferd S. Meyer, Trustees of the Florence Meyer Trust, Certificate No. 10 for one share, value $10;

H. T. Maroon (Nominee of the Florence Meyer Trust), Certificate No. 11, one share, value, $10; and Certificate No. 12 for one share, value, $10;

Rosalyn A. Meyer, Certificate No. 7 for 47 shares, value, $470;

Cecile A. Kiser, Certificate No. 8 for 25 shares, value, $250;

M. S. Cohn, Trustee for Gordon and Diane Cohn, Certificate No. 9 for 25 shares, value, $250.

It seems that the fact that the name W. C. Chadwick had been stricken from the list of "stockholders" was completely immaterial even though he signed the minutes. The immateriality is even clearer when we remember that the record discloses that the Defendants had freely admitted that Mr. Chadwick never was the real owner of that share of stock. Therefore, when the Trial Judge

asked Mr. Darlington, "How is that material?", he was seeking information as to how that line of interrogation could possibly bear on the question of fraud. It must be admitted that the answer given by counsel for Plaintiff-Intervenor was hardly informative. The remarks which followed, exchanged between the Trial Judge and counsel, certainly indicated no personal bias or prejudice in favor of the Defendants or against Plaintiff-Intervenor or his counsel. They were merely an expression of the legal opinion held by the Trial Judge as to the weight of the evidence which had been produced by the Plaintiff-Intervenor up to that point, and the court's concluding remark constituted an attempt on the part of the Trial Judge to prevent the issues from being obscured and to keep the case moving within the bounds of reason, as it was his duty so to do. 53 Am. Jur. 87, Trial, § 97.

> "It is also settled law in this court that the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court where clearly abused. See Pittman v. State (decided here at the present term), 41 So. 385, and authorities therein cited; 15 Ency. Pl. & Pr., 383 et seq.; Abbott's Trial Brief, Civil Jury Trials (2d Ed.), 114, 120."
>
> *Hoodless* v. *Jernigan*, 51 Fla. 211, 41 So. 194, 195.

This doctrine is, we believe, settled law in all jurisdictions. A court cannot be called upon to admit irrelevant, impertinent, or immaterial matter, but must take care that the evidence on which it shall be called upon to act is legal and that it conduces to the issue on behalf of either the Plaintiff or the Defendant. *Roach* v. *Hulings*, 16 Pet. (U.S.) 319, 10 L. Ed. 979. It seems clear that the Trial Judge was of the opinion that this particular line of questioning did not tend to produce anything having a bearing upon the issues. The Petitioner-Intervenor contends that the rulings com-

plained of indicate prejudice against the Plaintiff-Intervenor and in favor of the Defendants. But courts forbid any deduction of bias and prejudice from adverse rulings by a judge, whether they are right or wrong. Thus, prejudice on the part of a judge cannot be deduced merely because of error in ruling against a party to a cause upon a question of law. A holding of a trial judge is not evidence of his disqualification to try the case, on the ground of prejudice, where the appellate court reaches the same conclusion on the merits. *30A Am. Jur. 106, Judges, § 204.* In the case at bar the appellate court reached the same conclusion on the merits as was reached by the Trial Judge.

Fourth Attack on Trial Judge:

On page 21 of the Petitioners' appendix, Plaintiff-Intervenor again attacks the conduct of the Trial Judge. They charge that *during Plaintiff's direct examination of the same witness, Ferd S. Meyer, the judge again intervenes with leading questions to Defendant-Witness, Ferd S. Meyer, and draws self-serving answers or ultimate fact issue.* In the opinion of these Defendants the language used by Petitioners is a deliberate attempt to becloud the issue and mislead this court.

The record shows that the court opened at 10 a.m. on February 27, 1957 (Tr. p. 210), and the court immediately addressed the parties (Tr. p. 211), and said (Tr. p 214):

> The Court: "I am not asking about that. I am asking about these three propositions right here. What I am interested in right now is what interest did Sol Meyer have in this Family Loan Company, and what interest did Ferd Meyer have, and then following that would be the bankruptcy proceedings. It seems those three propositions constitute the gist of this law suit, and I think we might limit our testimony to those propositions."

Then followed discussions by counsel and the court and upon the witness assuming the stand, the court opened the proceedings by interrogating the witness:

> The Court: At this point, this may have been covered by your testimony yesterday, but I think the question was asked you, to your knowledge did Sol Meyer make any investment in the stock of the Family Loan Company?
>
> The Witness: No, sir, he did not.
>
> The Court: Ever at any time?
>
> The Witness: Never at any time.
>
> The Court: Did you make any investment in the loan company prior to the time that you and your associates assumed the active management of this company? Was there any investment made in that?
>
> The Witness: No, sir. That was all that was put in. I had one share which my mother gave me as part of the qualifying shares, and which was disposed of by me about a year after she gave it to me. Except for that one share, I had nothing invested in the Family Loan Company until Mr. Maroon and I were interested in it in 1940.
>
> The Court: You may proceed (Tr. pp. 217, 218).

Defendants say that the court's questions were not leading but were extremely pertinent and gave counsel for Plaintiff-Intervenor the opportunity to discredit the testimony of the witness within the framework of the three issues which the Trial Judge had indicated as being the order of the introduction of evidence. The record shows that Plaintiff-Intervenor disregarded the court's ruling as to the order of the introduction of evidence and proceeded with his examination of the witness as if conducting a pre-trial discovery deposition.

It seems clear that Plaintiff-Intervenor is overcritical of the Trial Judge without any real basis for that criticism.

The United States Court of Appeals for the Fifth Circuit was of the opinion that there is no merit to their contention.

Judge Considers Question Ridiculous and Out of Line:

The fifth charge of misconduct which Petitioners make against the Trial Judge involved the original share of stock which Ferd S. Meyer originally held in the company as the nominee of his mother, Florence Meyer. Plaintiff's Exhibit 1 (Tr. p. 147), showed the title history of the common stock of Family Loan Company with a table showing the history of issuance and dates of transfer of each certificate (Tr. pp. 145-146). Plaintiff was examining the witness with respect to that one share and was using the original stock book, Plaintiff's Exhibit 2 (Tr. p. 172), as the basis for examination. It must be remembered that Sol Meyer died November 18, 1939 (RV2, pp. 90-91). Certificate No. 4 had been issued to Ferd Meyer for one share on April 20, 1930, and had been cancelled on January 20, 1932, and reissued as Certificate No. 10 for one share to Sol Meyer and Ferd S. Meyer, trustees for Sol Meyer, Jr., Edward Meyer, and James Meyer (the Florence Meyer Trust). Certificate No. 10 showed that it had been endorsed for transfer to H. T. Maroon on October 19, 1940, and Plaintiff-Intervenor's questions concerned the endorsement on the back of Certificate No. 10. The exchange of questions and answers, objections by Defendants, and observations by the court are as follows:

> Q. This Certificate No. 10 is endorsed on the back "Ferdinand S. Meyer surviving trustee." That is your handwriting, is it not?
>
> A. Yes, it is.
>
> Q. It is written in pencil. Is there any reason for your writing it in pencil rather than pen?
>
> A. No special reason.

Q. For instance, was it written in pencil to show that the signature could be—

Mr. Bonsteel: Your Honor, we cannot hear counsel.

Mr. Darlington: I am sorry.

Q. Was it written in pencil for the purpose of making the signature so it could be erased at a later date if desired and another name such as Sol Meyer's name as trustee substituted?

Mr. Ward: If Your Honor please.

The Court: I think the question is ridiculous. I do. I think your question is out of line.

Mr. Darlington: If Your Honor please, there will be other evidence—

The Court: I understand, but I do not think you have any right to ask a witness if he is a crook on the witness stand. He is your witness now.

Mr. Darlington: He is an adverse witness. Rule 43 says I have the same right as on cross examination, and I am not placing it as to whether he is a crook. I am asking him a definite fact.

The Court: Do you know any reason why that was signed by pencil?

The Witness: I do not, Your Honor.

The Court: It is your signature?

The Witness: It is my signature, and the time it was signed, which was, I think, in 1940, my father was dead, and I certainly would have had no thought—I was the only trustee that could have signed at that time. My son was still four years away from majority when he became a trustee, and I don't know what would be implied by the question (Tr. pp. 233-234).

The Trial Judge was perfectly justified in thinking the question ridiculous. The face of the certificate showed that it was issued to Sol Meyer and Ferd S. Meyer, trustees for the Florence Meyer Trust. It was endorsed by

Ferd Meyer as "surviving trustee" at a time when Sol Meyer was dead. The insinuation made by Plaintiff-Intervenor's counsel that the witness was guilty of or planning a "fraud" is conduct which fails to comply with the Canons of Professional Ethics:

> "18. Treatment of Witnesses and Litigants. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf."
>
> *Canons of Professional Ethics adopted by the American Bar Association at its 31st annual meeting at Seattle, Washington, on August 27, 1908.*

The mildness of the court's comment is additional proof that the Trial Judge had no prejudice or bias against the Plaintiff-Intervenor. It is undoubtedly within the province of the Trial Judge to admonish and rebuke counsel when guilty of misconduct, as the occasion may require, and use other preventive measures to maintain the dignity of the courts. 53 *Am. Jur. 83, Trial,* § *90.*. We submit that this conduct on the part of counsel was hardly the candor and fairness in dealing with the facts which is required by Section 22 of the Canons of Professional Ethics.

Ink Eradicator and Expert Witness Incidents:

On pages 23 and 24 of their appendix, the Petitioners complain that the Trial Judge interrogated their counsel as to the materiality of a line of interrogation with respect to

a charge advanced by counsel that an ink eradicator had been used on the back of Stock Certificate No. 7. This incident took place on the morning of February 27th and is shown in the Transcript at pages 235-237. The history of this certificate as shown by the stock book, Plaintiff's Exhibit 2, and by the historical table showing the original issue and transfer of certificates, which was part of Plaintiff's Exhibit 1, is as follows:

> Stock Certificate No. 5 for 97 shares was issued to Florence S. Meyer on April 20, 1930. On December 1, 1930, Florence S. Meyer endorsed that certificate for transfer, and the transferees were as follows:
>
> Certificate No. 7 for 47 shares was issued to Rosalyn A. Meyer on December 1, 1931;
>
> Certificate No. 8 for 25 shares was issued on December 1, 1931, to Cecile A. Kiser; and
>
> Certificate No. 9 for 25 shares was issued on December 1, 1931, to M. S. Cohn, trustee for Gordon and Diane Cohn.

Rosalyn A. Meyer, under date of October 15, 1940, endorsed Certificate No. 7 for transfer to the following transferees, and the following certificates were issued:

> Certificate No. 22 for one share was issued on October 19, 1940, to Rosalyn A. Meyer,
>
> Certificate No. 24 was issued on October, 1940; for 40⅔ shares to Ferd S. Meyer, and
>
> Certificate No. 25 was issued on October 19, 1940, for 5⅓ shares to H. T. Maroon.

The record discloses that on the morning of February 27, Petitioners' counsel, in examining the back of Certificate No. 7, conceived that a portion of the green printed border had been eradicated by the use of a fluid ink eradicator, and he interrogated the witness, Ferd Meyer, as to the use of such an eradicator, but the witness denied all knowledge of any such incident.

The court then interrogated counsel as to what difference it would make as to whether an ink eradicator had been used to eliminate the name of a person *signed in a place reserved for a witness* to the signature of the owner in making the transfer. Counsel responded that it would make a "great deal of difference" *but declined to explain his theory to the court.*

"As a general rule, a party offering evidence must show its relevancy, materiality, and competency, and when he seeks to introduce evidence which does not appear to be relevant or competent, or propound to his witness an interrogatory which appears to call for an irrelevant or incompetent answer, he should make a formal offer of proof showing what testimony he proposes to adduce, and, when necessary, his intention to prove other facts which will render the evidence relevant or competent; the purpose for which apparently irrelevant or incompetent evidence is offered should be disclosed." *53 Am. Jur. 88, Trial, § 99.* T. p. 237 shows that when the court asked "What difference would it make?", counsel responded, "It makes a great deal," to which the court said, "What is it? Let us know what it is." Obviously, the court was making a proper inquiry as to the purpose of and the materiality of this line of questioning. But counsel failed to explain but did inform the court, "If Your Honor please, I did not intend to ask him any more along that line." It will be noted that the court's inquiry was proper and even despite the apparent irrelevancy, immateriality, and incompetency of the evidence, the court took no steps to exclude it, and after counsel had stated that he did not intend to pursue the line of questioning, the court observed, "Let us go to something else. He answered your question." We are at a loss to understand the thinking which caused Plaintiff-Intervenor to cite this incident as evidence of bias and prejudice against him on the part of the Trial Judge.

It is, however, important to note that the incident above referred to took place on the morning of *February 27th.*

Late in the afternoon of *March 12th* on the closing day of the trial, counsel for Plaintiff-Intervenor finally disclosed the theory and purpose behind the line of questions above referred to (Tr. pp. 1444, 1445). This disclosure appears in Petitioners' Appendix page 37.

Counsel for Plaintiff-Intervenor informed the court that he had arranged to have an expert present to examine Certificate No. 7 from Plaintiff's Exhibit No. 2 to "See if he can, without leaving the court corridors restore the original eradicated signature and date on the endorsement on the 47-share certificate of Rosalyn Meyer." The court observed that it would be immaterial, and counsel for the Plaintiff-Intervenor for the first time answered the question which the court had propounded to him on February 27th, as follows:

> "I have reason to believe I could show that instead of it occurring in October, 1940, as it is now written on there in the hand of Ferd Meyer with a pencil, that the true date was prior to Sol Meyer's death, and that instead of the witness being what is now written on there, the signature of Ferd Meyer, that the witness was Sol Meyer."

Counsel was not completely frank with the court even in that explanation since the real theory is set forth on page 64 of "Appellants' Brief" in Appellate Cause No. 16,817, lately pending before the United States Court of Appeals for the Fifth Circuit as follows:

> "It was and is our theory that Sol Meyer had her endorse this certificate in blank date, that he signed the endorsement as witness, and kept the certificate as his *own* down until his death in November, 1939. But when it later became necessary for Ferd to take the

> position that his wife, Rosalyn, owned this certificate down to October 15, 1940, he had to eradicate Sol Meyer's witness signature because Sol had died in November, 1939, and could not witness her transfer of the stock in 1940."

The trouble with this theory, as stated by Plaintiff-Intervenor, is that he had failed to introduce any evidence whatsoever to support it. These Defendants are without knowledge as to whether the break in the ink border was a printing error or whether in truth and fact a name had been signed in the space and removed by ink eradicator. If one must speculate, it is as easy to speculate that in signing the stock certificate, Rosalyn Meyer originally made a mistake and signed in the blank reserved for the witness instead of signing in the blank where her name must appear as transferror. That is pure speculation although it has more merit than the speculative theory advanced by Plaintiff-Intervenor.

As we have seen, counsel had stated as early as February 27th that *in his opinion* the Transfer Form, on the back of Stock Certificate No. 7, showed evidences that an ink eradicator had been used to remove the signature of the original witness. However, he took no steps to introduce any evidence that any erasure by chemical means or otherwise had actually been performed. He introduced no evidence that there was any original eradicated signature or date although he had had thirteen days intervening, and his request for permission to perform an experiment was based purely on his speculation and suspicion. He could not assure the court with any certainty that the results of such an experiment would bear out his accusation. It is fundamental that:

> "The admission of evidence of experiments or permitting them to be performed in court is a matter pe-

culiarly within the discretion of the trial judge, and this discretion will not be interfered with unless it is apparent that it has been abused. *Permission to perform such experiments cannot be demanded as a matter* of right. It is within the discretion of the trial court to permit or refuse to permit experiments but it is necessary to determine first whether there is such similarity of circumstances as to render the evidence competent."

20 Am. Jur. 628.

Counsel for Plaintiff-Intervenor did not inform the court of how much time the proposed experiment would require. It is obvious that such an experiment would have required a suspension of the trial for the period of time during which the proposed experiment was under way. As was said by the United States Court of Appeals, Fourth Circuit, in the case of *Moyer v. United States of America*, 206 F.2d 57, the suspension of a trial to enable a party to secure additional evidence is within the discretion of the trial court which properly denies a motion therefor where the party offers no explanation of his unpreparedness at the trial and no assurance that the delay would enable him to procure the proof necessary to sustain his contention.

"It has been said: 'Fraud is odious and not to be presumed.' In the ordinary transactions of life, fairness and honesty are presumed, and contracts or business transactions are presumed to have been made in good faith, until the contrary is established.

"The party who alleges fraud must establish his contention by stronger proof than would be necessary to show a mere debt or sale, for the reason that he must rebut the presumption of innocence and honesty."

Schweitzer, Cyclopedia of Trial Practice, Volume 1, pages 419-420.

Plaintiff-Intervenor had offered no proof of any fraud nor had he offered any proof that the requested experiment would produce proof of fraud. We submit that he had 13 days, from the time when he first expressed his suspicion, within which to have the document examined by alleged experts. We submit that the court was justified in summarily rejecting permission to conduct an experiment which would have required suspension of the trial for an undetermined length of time.

Unjustified Complaint of "Personal Attack" by Defendants' Counsel:

The Plaintiff-Intervenor on pages 24-25 of Petitioners' appendix complains that the Defendants' counsel made a personal verbal attack on the conduct of Plaintiff's counsel. The appendix presents quotations from the record without citation. However, the cited portion appears at Tr. pp. 264-265. It may be that the Petitioners were attempting to save space, but the quotation from the record does not truly present the entire picture of what transpired. We refer the court to the preceding pages of the record, 261, 262, 263. Where the witness, Ferd S. Meyer, testified as to the book value of the common stock showing that it was originally $1,000 and remained at that figure until December, 1939, when it was raised to $10,000 where it remained until April, 1942, when it was raised to $20,000 where it stayed until 1943, when it was raised to $30,000, and in 1944 it was raised to $121,000, and in 1946 it was raised to $141,000, and in 1947 it was raised to $297,000. Then followed testimony from the witness that he was not a stockholder between 1932 and 1940 but that in that latter year he became the owner of 40 2/3 shares of the stock by a transfer from his wife. Counsel for the Plaintiff (Tr. p. 263), inquired as to the source from which the witness ob-

tained the figures, and the witness informed him that the figures came from the certified public accountant's audits of the company which were in the court room and available to counsel. Thereupon one of the counsel for the Defendants stated that those records, the certified audits commencing from the beginning and being semi-annual in nature, had been submitted for examination to counsel for the Plaintiff on January 31 and that they have been available ever since and were brought into the court and tendered there for the consideration of counsel for the Plaintiffs and that the Defendants formally tendered these records for submission to the court. It was then (Tr. p. 264), that counsel for the Plaintiff said,

> "Mr. Ward, I accept your tender. Will you please hand me the stock book and stubs and canceled certificates covering the period from 1940 to 1950?"

It was apparent to everyone in the court room that counsel for Plaintiff-Intervenor was deliberately misinterpreting the offer made by Mr. Ward, counsel for the Defendants, and was attempting to confuse either the trial judge or the record.

This type of conduct has been universally frowned upon by the courts and is classified as misconduct of counsel.

> "Other instances of misconduct are the willful bringing in or attempting to bring in of irrelevant, previously excluded, or incompetent evidence for the purpose of prejudicing the opposing party; the persistent pursuit of an incompetent course of questions; the making of statements of alleged facts in guise of questions propounded to witnesses."
>
> 53 Am. Jur. 360, 361, Trial, § 459.

Counsel for these Defendants did not wish either the court to be misled or the record to be doubtful as to the

misconduct of Plaintiff's counsel in this instance and of his persistent violation of the other examples of misconduct above referred to and called the court and counsel's attention to what seemed to Defendants' attorneys to be flagrant misconduct on the part of Plaintiff's counsel. However, the Trial Judge brushed the matter aside, merely observed, "Let us get along." (Tr. p. 265).

If the Trial Judge had been prejudiced against Plaintiff-Intervenor "throughout the trial," such a prejudiced judge would not have missed this opportunity to admonish counsel for Plaintiff-Intervenor as he had every right to do under the circumstances.

Trial Judge Justified in Stopping a Line of Questions on His Own Motion:

The Trial Judge in a federal court is more than a mere arbiter to rule upon objections as to evidence and to instruct the jury as to the law. He may and should take an active part in the examination of witnesses if he considers that the course of justice requires it. It is his function to elicit all the material evidence and to assist in making straight the path of justice, *Montrose Contracting Co.* v. *Westchester County,* 2d Cir., 94 F.2d 580. In making straight the path of justice, he may, of his own motion, exclude irrelevant matter in order to confine the trial to the issue before the court. *Payton* v. *Village of Morgan Park,* 172 Ill. 102, 49 N.E. 1003.

The Petitioners complain, on page 25 of their appendix, that the judge made his own objections and then sustained them.

On the afternoon of February 27, 1957, counsel for Plaintiff-Intervenor was examining the witness, Ferd Meyer, with respect to Certificate No. 14 for five shares

which Exhibit 2 showed to have been a reissue of part of Certificate No. 9 for twenty-five shares, formerly owned by M. S. Cohn, trustee for Gordon and Diane Cohn. Certificate No. 14 was issued to Leslie Meyer (Tr. p. 271). Then followed a series of questions about Leslie Meyer, and his means of livelihood, until the court (Tr. p. 281), asked counsel how these questions were material. Counsel responded that he wanted to develop circumstances to show light on whether Leslie Meyer was a *bona fide* stockholder or a "stooge for Sol Meyer or Ferd Meyer." Thereupon one of the counsel for Defendants announced that there was no secret about the matter, that the stock was not the stock of Leslie Meyer but actually belonged to the Florence Meyer Trust, and they were willing to stipulate to this. This offer to stipulate was refused, and the Trial Judge listened to a long series of statements by counsel for Plaintiff-Intervenor addressed to the court and then asked the witness whether he knew anything about this particular five shares of stock, to which witness answered he did, that it was issued to Leslie Meyer for the reason that when the twenty-five shares were purchased by the Florence Meyer Trust from the Cohn family, it was reissued in five-share lots to Leslie Meyer, Joe Maroon, V. McDaniel, H. T. Maroon, and H. F. Ireland in order that the company not fall within the purview of the Personal Holding Company Act and that upon being issued, each of the individuals immediately endorsed the certificate and redelivered them to the Florence Meyer Trust which continued to hold them (Tr. p. 284). Thereupon counsel for Plaintiff-Intervenor reiterated the questions asked by the court and again developed from the witness that Certificates Nos. 14, 15, 16, 17, and 18, each for five shares, were issued in the name of those nominees who held them for the Florence Meyer Trust and that

those stockholders of record did not have a nickel of their money invested in the stock (Tr. p. 285). That counsel then asked whether there had been any previous incident where some stockholder was holding stock in their name which in reality belonged to someone else, and the witness responded that there was such a previous incident, that being the qualifying shares held by himself, Rader, and Chadwick, as to which he had already testified. The witness was then asked whether that incident was for the purpose of evading the Personal Holding Act, and the witness responded that he did not believe the act was in effect at the time when he, Rader, and Chadwick acted as nominees for Florence Meyer but that as to the incident with respect to the shares held by Joe Maroon, V. McDaniel, H. T. Maroon, and H. F. Ireland, the shares were issued to them because of the Personal Holding Company act, and thereupon counsel for Plaintiff-Intervenor (Tr. p. 286), asked, "You do recall they were specifically set up that way. Now, just tell us what events you recall." Then followed the interchange between court and counsel of which Petitioners complain (PtA 25).

> "Where evidence is manifestly improper the court may, in its discretion, reject it whether or not it is properly objected to. * * *.
>
> "The court may reject irrelevant evidence on its own motion or upon objection. * * *. The Court should not permit irrelevant examination which has a tendency to create prejudice."
>
> 88 C.J.S., pages 197, 198, § 90.

Where proposed evidence is irrelevant or immaterial to the issues on trial, and therefore, inadmissible, the court may exclude it on its own motion, *Kimic* v. *San Jose Los-Gatos Interurban Railway Co.*, 156 Cal. 379, 104 Pac. 986; *Rosenberg* v. *Sheahan*, 148 Wis. 92, 133 N.W. 645.

An examination of the transcript of record, from page 271 through page 286, will disclose that the Plaintiff-Intervenor was wasting time and that most of his interrogation concerning the certificate was completely irrelevant and immaterial since it related to matters not in issue at the trial. When counsel said to the witness, "Now, just tell us what events you recall," that question was definitely not directed to any issue involved in the trial, and the court properly labelled it argument. Since it was too general to be a proper method of seeking to test the creditability of the witness, the court was justified in attempting to limit the examination to matters material to the issue before it.

Counsel for Plaintiff-Intervenor did not let the matter drop there but on this occasion, as happened constantly throughout the trial, continued to argue with the court (Tr. p. 287), and on Transcript 288 through 289 was permitted to ask the witness the questions which the court had first ruled out. This long series of immaterial questions was eventually halted by an objection made by Defendants that the interrogation along this line was clearly immaterial. This objection was sustained, and the Trial Judge stated (Tr. p. 292), "The court is getting awfully tired of this persistent examination on matters that are wholly immaterial. If you have any evidence now on the real issues in this case, present them."

We submit that the Trial Judge was eminently correct in attempting to keep the examination to the issues, and that if he made an error on that particular occasion, it is a harmless error since the counsel was then permitted to pursue his wholly irrelevant line of examination until eventually stopped by a proper objection being interposed by the Defendants.

Questions Bordering on the Ridiculous:

The Petitioners complain that an exchange of words between counsel for Defendants and counsel for Plaintiff-Intervenor and the observations of the Trial Judge directed to counsel for all parties is indicative of prejudice on the part of the Trial Judge. The exchange complained of is shown in the transcript, pages 328-330 (PtA 26).

In order to understand the exchange of words between counsel and the observation of the court, complained of, we must go back to the second day of the trial. The witness, Ferd S. Meyer (Tr. p. 126), testified that in 1940 he and Mr. Maroon took over the company and (Tr. p. 129), that they caused the capital to be eventually increased by about $200,000 and that he put in perhaps $80,000 and that Maroon put in one third of the amount of the increase. During the morning of the third day of the trial, the witness testified that Maroon secured some of the money from loans and that as to the source of the rest, he had no information (Tr. p. 259), and being further interrogated as to the exact amounts, he testified that he could not state the exact amount of monies without analyzing the audits (which were in the court room) (Tr. p. 260), and then testified specifically as to the increases in the capital stock and the years in which those increases occurred (Tr. p. 261); he stated that in 1940 he became the owner of 40 2/3 shares and that Maroon became the owner of 33 1/3 shares (Tr. p. 262). In the afternoon of that day counsel for Plaintiff-Intervenor was interrogating the witness about the twenty-five shares of stock which were part of the twenty-eight shares that Maroon had purchased from the Florence Meyer Trust on the 19th day of October, 1940, and asked the witness (Tr. p. 328), whether Maroon bought it on that date, to which

the witness responded, "Yes". Counsel then asked, "How much did he pay for it?" and the witness replied, "I don't recall the exact amount".

Counsel for Plaintiff-Intervenor then indulged in a line of sarcastic questions which were eventually objected to as being argumentative, and the court ruled the questions to be pure argument, but counsel for Plaintiff-Intervenor was not satisfied to accept a ruling of the court but again injected a sarcastic and improper statement into the record as follows, "I want to find out what his recollection is as to whether Hoke Maroon gave him as trustee of this trust $1 or $10,000 or what".

If that was the actual desire of counsel, he could have obtained that information by proper questioning, and in fact, he did receive the answer on page 336 of the transcript where he was referred to the auditor's report of October, 1940, which had always been available to him.

The conduct of Plaintiff-Intervenor's trial counsel toward the witnesses has already been commented on, and it may be that one of the counsel for the Defendants did display justifiable indignation while objecting to the improper harassment of the witness in trying to require the witness to rely on memory when records were available.

It will be noticed that the Trial Judge was not influenced by the statement of defense counsel but directed the first part of his remarks to all counsel and then turned to counsel for Plaintiff-Intervenor and observed that "I do not hesitate at all to say to you, Sir, that many of these questions are not only immaterial, but they are bordering on the ridiculous" (Tr. p. 329). The fact that the court was not directing his first general remarks to counsel for Plaintiff-Intervenor is demonstrated by the court's re-

sponse to another statement by that counsel when the court said, "No. I do not want to reprimand you at all. I just want you to limit your questions to the issues in this case. I think you have gone entirely too far on some of your cross-examination. It is repetitious". (Tr. p. 330).

The emphasis which Petitioners have applied to the excerpts from the trial record which appear in Petitioners' appendix is completely misleading and seems to be an attempt to pervert the record as it actually appears. Any fair reading of the original record will show that the Trial Judge was merely trying to control the conduct of the trial and keep the evidence to the issues. In this instance he was merely telling counsel for both sides to stop bickering and keep to the case. The only error the court could possibly be said to have made was in referring to the examination of the witness as cross-examination when it was in fact direct examination. However, in view of the nature of the questions, the court's classification of the examination as cross-examination is quite understandable.

Petitioners' Further Complaints:

It seems unnecessary to belabor the issue by further specific argument as to each of the Petitioners' complaints as to the conduct of the examination.

The issues which Plaintiff-Intervenor was required to prove were these:

(1) That Sol Meyer had furnished the capital to organize and operate Family Loan Company and that the Defendants held the stock and evidences of indebtedness of that company as the fraudulent voluntary transferees of Sol Meyer;

(2) That Ferd Meyer had been the owner of a substantial amount of the stock and evidences of indebtedness of Family Loan Company at the time he filed voluntary bankruptcy and that he had fraudulently failed to schedule these assets in the bankruptcy proceedings and that the Defendants owning the stock in the company were the fraudulent voluntary transferees of Ferd Meyer.

The Plaintiff-Intervenor failed to offer any proof in support of either of these propositions.

Plaintiff-Intervenor had failed to take any pretrial discovery whatsoever. It is admitted that on pretrial discovery depositions the Plaintiff-Intervenor could have properly asked most of the questions which he sought to propound during the trial, on the theory that the answers to those questions might lead to the discovery of names of witnesses who could give informative testimony or that the answer might open other avenues of inquiry which might lead to information to support the Plaintiff-Intervenor's claims.

But the time for that type of interrogation had passed when the case was called up for trial. We acknowledge that when persons are charged with fraud, the opposing party is entitled to some latitude in interrogating those parties, but that latitude does not go so far as to examine into matters that are not properly within the issues of the case.

There were two critical dates involved in the claims of Plaintiff-Intervenor.

(a) The Plaintiff was required to prove that Sol Meyer furnished the capital of the company and owned the stock and evidences of indebtedness between March, 1930, when the company was organized, and November 18, 1939, when Sol Meyer died;

(b) The Intervenor was required to prove that Ferd Meyer owned stock in the company and evidences of indebtedness during the period from September 20, 1922, the date on which the stockholders' liability judgment was recovered against him, and September 18, 1933, the date on which he was adjudged bankrupt.

Plaintiff-Intervenor, not having prepared for trial, had no plan of interrogation and the questions propounded fell into the wandering or fishing classification, which inevitably led to irrelevant and immaterial examination. It was the duty of Plaintiff-Intervenor to submit some evidence that Sol Meyer was the actual equitable owner of the stock and evidences of indebtedness of the company, but he failed to do so, and likewise, it was the duty of Plaintiff-Intervenor to submit some evidence that Ferd Meyer had committed fraud in his bankruptcy proceeding and that in truth and fact he was the equitable owner of stock and evidences of indebtedness of the company during the period between the entry of the judgment and his adjudication as bankrupt, but no evidence whatsoever in support of either of those claims of fraud was submitted to the court. On the contrary, the evidence showed that Sol Meyer was never the owner of any stock or evidence of indebtedness of the company and that Ferd Meyer was not the owner of any stock or evidence of indebtedness of the company at any time prior to 1940. Under these circumstances it becomes readily apparent that when Plaintiff-Intervenor sought to examine the Defendants with relation to the details of the sale of stock to Seaboard, the evidence was irrelevant and immaterial to the case because no foundation had been laid to make such examination relevant. The complete lack of any evidence or even a plan of examination of witness is demonstrated by Petitioners' statement in their appellants' brief, filed in the United

States Court of Appeals for the Fifth Circuit, brief page 35, where they say:

> "We believe this record plainly shows a glaring miscarriage of justice resulting from the District Court's application of the new, subversive, 'rush it through' technique, and the 'it's gotta be done now' dogma, which has recently taken hold in many (not all) federal courts.
>
> "This dangerous dogma, fostered during the last twenty years by left-wingers and subversives in the Government, sometimes aided by gullible do-gooders in and out of the bar—has been secretly designed primarily as a means for rushing and forcing left-wing social litigation through the federal courts, and also as a means to aid subversives by the technique of rushing the investigator or the prosecutor to prevent full investigation and presentation of the facts against them."

This complaint, like the other complaints of Petitioners, was not justified by the record. As the Court of Appeals pointed out in its opinion, nearly two years elapsed between the date on which the case became at issue and the date on which the case was noticed for trial, and over two months elapsed between notification of trial date and date of the pretrial conference, but Plaintiff-Intervenor took no steps during either of those periods to prepare for trial. It is fundamental that there must be an end to litigation, and no one is entitled to a continuance on the ground that he is not ready to proceed with trial unless he has exercised reasonable diligence in every direction in which he claims to be unprepared.

Every complaint made by the Petitioners in this cause stems from the fact that the Trial Judge attempted to conduct the trial in an orderly way, by confining the examination to the issues which the court would be required to

resolve. Plaintiff-Intervenor, having no evidence to support his respective charges of fraud, now complains that the Trial Judge refused to permit him to use the trial forum as an opportunity to make the preparation for trial which they should have made prior to the commencement of the trial.

Termination of Examination of Witness Was Proper:

The Petitioners complained in their appeal and complain here that the trial court committed error in terminating the examination of the witnesses, Maroon and Meyer.

The United States Court of Appeals, Fifth Circuit, held that the judge's conduct was proper.

The record (Tr. p. 421), shows that Hoke T. Maroon was called as witness by the Plaintiff at the opening of court on the afternoon of February 28th and remained on the stand during all of that afternoon. His examination was resumed on the morning of March 1, 1957 (Tr. p. 515), and continued throughout that day. His examination was resumed on the morning of Monday, March 4th (Tr. p. 671), and continued throughout that day. The witness was excused from examination on March 5th, but his examination was resumed on the morning of March 6th (Tr. p. 942), and he continued on the stand throughout that day. The witness resumed the chair on the morning of March 7th (Tr. p. 1048), and continued under examination until the court adjourned for the day at noon.

Just before adjournment Defendants objected to a continuation of the repetitious and immaterial nature of the examination, and the Trial Judge, addressing counsel for Plaintiff-Intervenor, again told him that the court had indicated the primary issues in the case on numerous oc-

casions and observed that Plaintiff could not go behind the bankruptcy proceedings unless he made a showing of fraud, and that

> "What happened in 1953 is certainly immaterial. What happened in 1936 to 1938 or 40, we have gone all over that. None of that is material unless you have laid your foundation for it, and I would like to have some evidence, if you have it, as to how Sol Meyer was interested in those two or whether Ferd Meyer failed to list all of his assets." (Tr. pp. 1074-1075).

and in response to a long statement by counsel for Plaintiff-Intervenor, the court said:

> "I just want you to show me something that I can point to as competent evidence in support of your allegations." (Tr. p. 1077).

The witness, Maroon, again entered the witness box on the morning of March 8th and continued on the witness stand until the noon recess, at which time the Trial Judge said:

> "You are excused, Mr. Maroon. The court will pass on the type of questions you want to ask him, and if they are proper, we will recall the witness, but your line of questioning now, he has been here two days, and you are doing nothing but just fishing. I am getting tired of it. The court will adjourn until two o'clock." (Tr. p. 1162).

Actually, the witness had been under examination for one-half day on February 28th, all day on March 1st, all day on March 4th, all day on March 6th, a half-day on March 8th, or a total of four and one-half days. On March 7th, during the morning session (Tr. p. 1070) the court had warned counsel for Plaintiff-Intervenor that he was not asking the witness any pertinent questions and that when

the witness left the stand, he would be permanently excused unless Plaintiff-Intervenor had some pertinent questions to ask him. After four and one-half days of testimony, a vast majority of it being immaterial, irrelevant, or repetitious, the court justifiably felt that he was authorized and required to exercise his discretion in controlling the length and extent of the examination of the witness to prevent unnecessary delay of the trial.

> "The duty of a Trial Court requires it to limit examinations of witnesses to the production of evidence affecting the issues. A typical example occurred in the case of *United States* v. *German-American Vocational League*, 153 F.2d 860, in which case the Trial Court terminated the cross examination of a witness after he had been on the stand for two and one-half days under cross examination. The Appellate Court affirmed the Trial Court. And in the case of *United States* v. *Lawinski*, 195 F.2d 1, the Trial Court limited the examination of a witness and on appeal the Court said:
>
> > 'There is certainly a limit to the extent that a witness may be cross examined. Nor is it proper for an able counsel to convert a cross examination into an argument to the jury.
> >
> > 'The trial judge is in the best position to determine how far the cross examination should proceed, and, when convinced that the facts are all presented and fairly before the jury, the examination of a witness, either on direct or cross examination should cease.'
> >
> > 'See also Nashville Interurban Railway v. Barnum, 2nd Cir., 212 Fed. 634 at page 640; United States v. Hornstein, 7th Cir., 176 F.2d 217 at page 220; Radin et al. v. United States, 2nd Cir., 189 Fed. 568 at page 575; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. 8th Cir., 129 Fed. 668 at page

681; Harrold v. Territory of Oklahoma, 8th Cir., 169 Fed. 47 at page 53; Quigley v. United States, 1st Cir., 19 F.2d 755 at page 759; Despiau v. United States Casualty Co., 1st Cir., 89 F.2d 43 at page 44.

United States v. Lawinski, 195 F.2d 1."

The witness, Ferd Meyer, was called to the stand on the morning of February 26th (Tr. p. 86), and remained under interrogation all that day; he resumed testifying on the morning of February 27th (Tr. p. 217), and remained on the stand all that day. On February 28th he was called to the stand at the commencement of the trial and remained under examination until the noon recess (Tr. pp. 374-421). He was recalled to the stand on the morning of March 5th (Tr. p. 833), and remained under examination all day. He was again recalled to the stand on the afternoon of March 8th (Tr. p. 1164), and remained on the stand for the rest of the day. On the morning of March 11th he was recalled to the stand (Tr. p. 1240), and remained on the stand all day, and on the morning of March 12th the witness was again called to the stand by Plaintiff-Intervenor (Tr. p. 1368). The court excused him from the stand late on that afternoon (Tr. p. 1427). The Trial Judge, in excusing the witness, informed counsel for Plaintiff-Intervenor that

> "You have not asked him a single question for more than a day that has not already been asked and I am questioning the good faith of your procedure. The witness is excused."

It is fundamental that the scope and extent of the examination of the witness are matters for the discretion of the trial court, and the scope of the examination should not be extended or permitted beyond what would be fair and reasonable limits. It will be observed that this witness had been under examination for six days and that

the Trial Judge was of the opinion that the examining counsel had been trifling with the court for a considerable amount of that time and that he had had more than ample opportunity to elicit from the witness any information which could be obtained affecting the issues before the court. Under these circumstances it seems that far from being a prejudiced tribunal, the court had exhibited extreme patience and impartiality and had given counsel every opportunity to produce facts in support of the allegations if any such facts existed.

SUMMARY AND CONCLUSION.

The preliminary part of the brief contains specific answers to the charges made by the plaintiff in the petition for certiorari, but briefly summarized the charge as made in view of the record do not support the claim that this Court should exercise its admitted jurisdiction on the grounds of certiorari for the following definite reasons:

1. There is no charge that the lower Court ruled erroneously in applying the law to the facts as presented.

2. There is no claim made that the mass of evidence that was introduced in the lower Court represented through the voluminous books, records, auditors' reports, and some twelve days of testimony was not sufficient to support the findings of fact by the lower Court.

3. There is no claim therefore that the findings of fact as made by the Trial Judge, and sustained by the United States Court of Appeals, Fifth Circuit, was not ample to support the judgments arrived at.

4. There is no claim that the District Court Judge was or could have been subject to disqualification under the terms of Section 144 of 28 U.S.C.A.

5. This Court has many times held that certiorari would not be granted to answer questions by petitioner claiming that a review of the evidence is sought, or when the petitioner seeks to review inferences drawn from the evidence. *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849, *U. S.* v. *Johnson*, 268 U.S. 220, 16 L. Ed. 925, 45 S. Ct. 496, *Southern Power Company* v. *North Carolina Public Service Co.*, 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164.

6. There is no claim made that the lower Court committed any harmful error in making any rulings as to the admission or non-admission of evidence with the exception of the several points which were passed on squarely by the Court of Appeals, and reflected in its opinion. However because of the generalities of the attack made in the petition in which it is apparently claimed that the Judge in the Court below, the Trial Court was prejudiced and biased, and that the action of the Appellate Court was either biased or erroneous, we have sought to point out in the preliminary part of this brief certain basic and undisputed facts that appeared in this record which consist for the large part documentary evidence, books and records which were all open for public inspection for many years. If there was any error, which we do not concede, and which the Court of Appeals could not find, it certainly was of such minor nature that it could not come within the rule.

7. The question of the evaluation of the evidence, and the control of the taking of testimony lies largely within the discretion of the lower Court, and when reviewed by the U. S. Court of Appeals the decisions of this Court show that certiorari will not be granted to review the factual determinations.

The decisions relied upon by the petitioner are not in point. We think this petition is governed by the decision

of this Court in *Houston Oil Co. of Texas et al. v. Goodrich et al.*, 245 U.S. 440, 38 Sup. Ct. Rep., p. 140, 62 L. Ed. 385, in which this Court held the refusal of the District Court to submit certain Instructions to the Jury on the ground that there was not evidence enough to warrant a finding thereon in favor of the parties asking submission, when approved by the Circuit Court of Appeals will not be reviewed by the Supreme Court on certiorari, in the absence of some sufficient reason. In the body of the opinion THIS Court said:

> "As grounds for granting the writ petitioners alleged that the trial court erred in refusing to submit to the jury (1) whether the deed first dated was in fact executed; (2) whether it was presented for record before execution of the later one; (3) whether vendee in the junior deed was a bona fide purchaser for value; (4) whether the junior deed was forged; and (5) whether the action was barred by the three year statute of limitations. The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the Circuit Court of Appeals reached the same result. 226 Fed. 434, 141 C.C.A. 264.
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> "The record discloses no sufficient reason within the rule long observed why we should review the judgment below. Forsyth v. Hammond, 166 U.S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.
>
> Dismissed."

8. It is apparent from the record that the District Judge acted wholly within the scope of his rights and his duty, and that there was no misconduct, prejudice, or bias shown in the record.

It has been definitely pointed out that in 1932 the Florence Meyer Trust was created, and that trust instrument was recorded in Indiana, and made a matter of public record in the County. The Meyer-Kiser Bank had been located where the parties resided. The purpose of that trust was for the protection of certain children who were mentally incapacitated. After the Meyer-Kiser Bank closed, litigation ensued, and as reflected in the opinion of the Appellate Court of Indiana, reported in 37 N.E.2d 291 it is apparent that in the litigation brought by the Petitioner's predecessor in Indiana, all of the transactions with reference to Sol Meyer and his relationship to the Bank, and the placement of the proceeds of money which he is alleged to have taken from the Bank was all set forth. The opinion shows the tracing of the affairs of Sol Meyer from 1931, up to the time of his death in 1939. It was found that he had contributed certain moneys to the Meyer-Kiser Bank Realty Company, to the Meyer-Kiser Bank of Miami, Meyer-Kiser Corporation, United Securities Corporation, and Floridan Hotel, most of them Florida corporations. That suit, upon which this final opinion was predicated, was filed by Thomas E. Garvin as Receiver, appointed by the Marion Circuit Court of Indiana on May 4, 1933, or one year after the Florence Meyer trust had been recorded on the records of Marion County. We mention this fact because it is apparent that there was a thorough investigation in the Courts of Indiana of all of the transactions of Sol Meyer. The parties were all alive at that time, the records were all clear, and the witnesses who had knowledge of the transactions were all alive. This was a personal suit and Sol Meyer was defendant in that case, and personally served, and yet there does not appear anywhere in that record any claim that Sol Meyer had given, or diverted any funds to his wife Florence Meyer, or to the Florence Meyer Trust.

The records show a most thorough analysis of the Sol Meyer transactions, and certainly the assets in that trust would have been revealed, if anyone had conceived or imagined they had in any way come from Sol Meyer as a result of any illegal conversion of funds.

The Family Loan Company in Miami had been formed in 1931 so that in a period of five years of litigation no one contended that the assets in the Florence Meyer Trust were even under suspicion.

When Sol Meyer died in 1939 his estate was administered in Dade County, Florida. The transcript of the record which was filed in Case No. 13,488, United States Court of Appeals, Fifth Circuit, filed April 5, 1951, which is made a part of the record in this final review, show (beginning p. 102) that on the 22nd day of May, 1944, Ferd Meyer Administrator C.T.A. of the Estate of Sol Meyer was granted a final discharge by the County Judge of Dade County, Florida.

Before that discharge had been entered, on the 16th day of May, 1940, and during the progress of the administration proceedings in Dade County, Thomas E. Garvin as Receiver of the Meyer-Kiser Bank in Indianapolis, Indiana, instituted creditor's bill in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Chancery No. 63001, in which it was sought in that Court to trace the proceeds of property alleged to have been conveyed to the Trustees or to Ferd S. Meyer as Trustee, or to Ferd S. Meyer, individually. A photostatic certified copy of that entire record was introduced in the Court below in this trial (Tr. p. 1453, RV 102). It shows that one of the attorneys of record in this case, Mr. Leo S. Julian, was attorney for the Receiver in that case, and the record shows that there was controversial

litigation, pleadings were filed, extensive testimony taken, with petitions for extension of taking of additional testimony filed time after time. This litigation in the State Court extended over a period of several years. The cause instituted on the 16th day of May, 1940, was referred to a Master on June 11, 1943. Considerable testimony was taken before the Master, which was all shown in the record beginning on page 180. Plaintiff's exhibit 4 entered before the Master in that case (See RV 222) shows the original indenture of trust from Florence S. Meyer to Sol Meyer and Ferd S. Meyer, as Trustee, which had been filed in the Public Records of Marion County, Indiana, on November 28, 1932. A determination of that trust was an issue in the case. The record further discloses that on the 25th day of September, 1943 (shown at Tr. p. 241), the Circuit Court of Dade County, Florida, after reviewing the pleadings, and the evidence, and Master's Report, found:

> "that said evidence wholly fails to show that Sol Meyer ever conveyed to the Defendants, or either of them, any property, real, personal or mixed, as alleged in said Bill of Complaint and that, therefore, the Plaintiff has wholly failed to maintain by competent evidence the material allegations of his said Bill of Complaint."

The cause was dismissed.

Since there was no testimony and no claim in the proceedings in Indiana relative to the Family Loan Company and the Florence Meyer Trust, and since the decision in the Circuit Court of Dade County, Florida, in 1943, found specifically that Sol Meyer had never transferred any of his funds to the Trustee or to the Family Loan Company which was mentioned in the testimony, and since the Florence Meyer Trust was the subject matter

of that litigation among other things, it is apparent that there was no testimony known or found by any of the parties from 1933 up to 1943, which could have been the basis of a legitimate charge. That decision of the Circuit Court, Dade County, Florida, was *res judicata* on issues pertaining to the Florence Meyer Trust or the assets of the Florence Meyer Trust, or the relationship of Sol Meyer with the Family Loan Company between 1931, when it was organized, and the date of his death. See recent decision by the United States Court of Appeals, Fifth Circuit, 266 Fed. Rep. 2d, p. 722, *William H. Matthews, Appellant,* v. *Lulu M. Wolvin and Olive M. Matthews, as Surviving Trustees of Alliance Investment Corporation et al.* The District Court Judge who had originally heard the preliminary part of this case, and who passed upon the pleadings in the case, and upon this proceeding in the State Court, has held that those proceedings were conclusive. The United States Court of Appeals for the Fifth Circuit sent the case back for trial on factual matters because as pointed out in their several opinions there were additional allegations of concealment, and the Court felt that there should be a trial on the facts.

We respectfully say that all factual matters that could be established had been thoroughly passed on by the Florida Court, and that the matters set forth therein were *res judicata*.

Now, in the trial before the District Court in this case, it was incumbent upon Mr. Peckham who was simply the successor of Garvin to show additional facts or circumstances. There was involved in this final trial the collateral feature about the bankruptcy action filed by Ferd S. Meyer in 1933, and the entire bankruptcy file

in that case was introduced as an exhibit (RV 2-162). When that file was introduced it clearly disclosed that the judgment against Ferd S. Meyer was set forth in the schedules, was duly scheduled, notice promptly given, and that Mr. Garvin through his attorneys appeared in that case, and there was a proper final discharge in that case. There was no attempt made to dispute any of those facts before the District Judge who heard all of the evidence in this case.

As aptly pointed out by the United States Court of Appeals, Fifth Circuit, in its opinion of affirmance, the lower Court had permitted plaintiff's counsel some 12 days in which to produce some evidence to support these additional allegations. All of the evidence which had been presented in the State Court was reproduced. In addition thereto there were volumes of records and complete auditors' reports showing the whole transactions of the Family Loan Company which was semi or a *quasi* banking institution under the control of the Florida authorities. After some 12 days, as was pointed out by the Court in its opinion, and approved by the United States Court of Appeals, Fifth Circuit, there was no evidence which had been submitted which supported the claims of the petitioner. The lower Court held that there was ample evidence to sustain the position of the defendants, and there was no evidence to sustain the position of the plaintiff, the petitioner herein.

Now the sole point of attack here is that because the lower Court made certain rulings and made certain findings of fact that the District Judge who tried the case evidenced bias, and therefore prejudice, and that this Court should review the case.

We respectfully say that this petition does not present the type of case which would call for any intervention by this Court on certiorari, and petition should be denied.

Respectfully submitted,

WILLIAM GRESHAM WARD,
GARLAND M. BUDD,

By .....,
Attorneys for Respondents.

CERTIFICATE OF SERVICE.

I Hereby Certify that on this the ..... day of , 1959, I mailed a copy of the foregoing Brief to Leo S. Julian, Biscayne Building, Miami, Florida, and to Jay E. Darlington, 306 Hammond Building, Hammond, Indiana, Attorneys for Petitioners, and to Louis S. Bonsteel, 1301 duPont Building, Miami, Florida, Attorney for Respondent, Seaboard Finance Company.

GARLAND M. BUDD and
WILLIAM GRESHAM WARD,

By .....,
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